

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

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JR. CLERK

—♦—
No. 76-317
—♦—

O-J TRANSPORT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents,

and

ASSOCIATED TRUCK LINES, INC., BLUE
ARROW-DOUGLAS, INC., CENTRAL TRANSPORT, INC.,
MICHIGAN EXPRESS, INC., EXPRESS FREIGHT
LINES, INC., GREAT LAKES EXPRESS COMPANY,
INTERSTATE MOTOR FREIGHT SYSTEM,
R-W SERVICE SYSTEM, INC. and
COURIER-NEWSOM EXPRESS, INC.,
Intervenors and Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

—♦—
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
OF RESPONDENTS ASSOCIATED TRUCK LINES,
INC., BLUE ARROW-DOUGLAS, INC., CENTRAL
TRANSPORT, INC., MICHIGAN EXPRESS, INC.,
EXPRESS FREIGHT LINES, INC., GREAT LAKES
EXPRESS COMPANY, INTERSTATE MOTOR
FREIGHT SYSTEM AND R-W SERVICE
SYSTEM, INC.

—♦—
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Pursuant to Rule 24 of the Rules of this Court,
 respondents and intervenors Associated Truck Lines,
 Inc., Blue Arrow-Douglas, Inc., Central Transport, Inc.,

Michigan Express, Inc., Express Freight Lines, Inc., Great Lakes Express Company, Interstate Motor Freight System and R-W Service System, Inc., hereby submit their Brief in opposition to the Petition for Writ of Certiorari in this matter, following the decision of the United States Court of Appeals for the Sixth Circuit in *O-J Transport Co. v U.S.*, 536 F. 2d 126 (6th Cir., 1976) (A25).*

ARGUMENT

By its Petition for Certiorari, petitioner, O-J Transport Company, asks this Court to consider an issue which has been completely resolved by this Court in its very last term. The question which O-J presents to the Court is that of the obligation of a Federal regulatory agency to give determinative weight to racial or ethnic factors which are unrelated to the agency's statutory functions. Specifically, the issue presented by the O-J Petition is whether the Interstate Commerce Commission was required to afford determinative weight to the minority status of O-J's owners in determining whether to grant O-J's application for motor common carrier authority. In *NAACP v Federal Power Commission*, ____ U.S. _____, 96 S. Ct. 1806, 48 L. Ed. 2d 284 (decided May 19, 1976), this Court conclusively resolved this issue, analogizing the obligations of the Federal Power Commission to those set forth in several cases arising under the Interstate Commerce Act. Yet, less than four months later, petitioner is asking this Court to issue yet another decision on this subject, involving the very same statutes which it discussed in deciding the *NAACP* case.

Respondents maintain that the decision of the Sixth Circuit below is completely in accord with the principles of *NAACP* and that there is no basis for granting the Petition for Certiorari by O-J.

In the *NAACP* case, the issue before the Court was to what extent Congress had granted the Federal Power Commission authority to combat discriminatory employment practices by the companies it regulates. (48 L. Ed. 2d at 289) The Court was presented with two statutory bases to justify a conclusion that the Commission could or must concern itself with such practices. Initially, it was argued that the Commission had the power to exclude costs from such practices from its consideration of the reasonableness of rates of regulated companies. Exclusion of unnecessary costs had long been provided for under the Federal Power Act and the Natural Gas Act, and the Court accordingly confirmed the Commission's power to apply its statutory functions to costs arising from employment discrimination. However, in Part B of the *NAACP* opinion, the Court has refused to conclude that the Commission must otherwise concern itself with discriminatory practices merely because the term "public interest" appears at various points in the Power and Gas Acts. Rather, the Court in *NAACP* has held that the Federal Power Commission was authorized to consider discrimination only insofar as such discrimination was related to its statutory goal of promoting the orderly production of electric energy and natural gas at just and reasonable rates. It has specifically refused to approve attacks on discrimination by the Commission which were unrelated to the Commission's specifically defined regulatory functions. In short, where no connection is

*Citations to the decisions in the appendix to the Petition are given as (A ____).

shown to exist between employment discrimination and the production of gas or electricity at reasonable rates, the Commission has no authority to take action regarding such discrimination. Thus, the *NAACP* decision clearly limits agency consideration of racial factors to those situations where such factors are shown to have a direct connection to the agency's stated regulatory functions.

The relief sought by O-J is exactly that which was rejected by this Court in Part B of *NAACP*, namely a request that determinative weight be attached to O-J's minority ownership in an application proceeding before the Interstate Commerce Commission, even though no connection had been demonstrated between such ownership and the transportation service to be provided to the shipping public. Like the petitioners in *NAACP*, O-J argued extensively before the Court of Appeals that the term "public convenience and necessity" appearing in the Interstate Commerce Act was sufficiently broad to encompass the goal of promoting minority entrepreneurship. (*O-J Transport Co. v U.S.*, 536 F. 2d at 131) (A32) No attempt was ever made to show that the fact that O-J's owners are black would in any way enhance the nature of the transportation service proposed by O-J. Further, none of the supporting shippers stated that minority ownership would have any bearing on the type of motor carrier service they expected to receive. (*O-J Transport Co. v U.S.*, 536 F. 2d at 131, 132) (A32, A35, A36) The Court of Appeals recognized the long line of decisions under which the Commission has stated that it will give consideration to racial factors when properly related to transportation circumstances. (536 F. 2d at 131-132) (A34) The logic of these cases is similar to that applied to the Federal Power Commission in Part A of *NAACP*. However, the Court noted that whereas these cases described the manner in which minority ownership

had to be related to transportation needs of the public, the contention that minority ownership in and of itself must be promoted by the Commission was a matter relating only to the general public welfare. (536 F. 2d at 132) (A35, A36) As the evidence in O-J had not related O-J's minority ownership to transportation needs, the Court of Appeals found that such ownership was not a proper consideration for decision by the Commission. (536 F. 2d at 132) (A36) This is in complete accord with the reasoning of this Court in *NAACP*, and, in fact, the Court of Appeals specifically cited *NAACP* as a basis for its decision.

There is no merit to any of the arguments advanced by O-J to suggest that the standards set forth in *NAACP* are somehow inapplicable to the *O-J* case. Initially, O-J has attempted to draw a distinction between actions of federal agencies depending on whether the agency is evaluating the conduct of existing licensees or rather, evaluating whether additional persons should become licensees. (See Petition for Certiorari, p. 12, 13) This is a meaningless distinction. In imposing conditions on existing licenses and in granting new licenses, an administrative agency operates pursuant to a common body of statutory authority. There is no merit to any suggestion that an agency could go beyond its specific statutory functions in granting new licenses, even though it is required to stay within these functions in governing the conduct of those who already hold such licenses. The holding of this Court in *NAACP* is clearly that agency actions must be in furtherance of the specific statutory purposes set forth by Congress, rather than pursuing actions which merely promote the general public welfare.

This standard applies equally regardless of whether the agency is considering the need for the granting of a new license or acting to set conditions on the service performed under an existing license.

Similarly, there is no merit to O-J's attempt to characterize the decisions of the Commission and the Sixth Circuit as holding that minority status could never be considered in an application for motor carrier authority. Initially, it is clear that the Commission's report in *O-J* does not take this position. In its report, the Commission initially held that as a threshold matter, applicant's minority ownership could have had some bearing on the application proceeding. One of the protestant motor carriers, Courier-Newsom Express, Inc., had moved to strike portions of a pleading filed by O-J pertaining to its minority ownership, for the reason that such ownership could not be considered by the Commission and was, therefore, immaterial. The Commission rejected this motion to strike, finding that matters relating to the ownership of the applicant were properly included within the record. (*O-J Transport Company Com. Car. App.*, 120 M.C.C. 699, at 700) (A8, A10) Moreover, the language in the majority report discussing whether O-J's black ownership should be considered indicates at numerous points that it relates specifically to "this application" and to "such evidence" as was presented by O-J. The Commission treated O-J's request for consideration of its minority status as a request for preferential treatment, or favoritism, rather than as a request based on any evidentiary justification relevant to the Interstate Commerce Act. In his dissenting opinion, Commissioner O'Neal questioned whether the language of the majority opinion suggested an overruling of the Commission's long line of cases giving effect to minority ownership in certain situations. (120 M.C.C. at 705) (A17) However, the majority made

no indication that it intended to overrule or modify this prior decisional law.¹ Thus, contrary to O-J's assertion at page 14 of its Petition, the Commission's decision did not hold that in all cases the ownership of an applicant could not play a role as to whether a grant of authority should issue. Rather, the Commission's determination was that an applicant such as O-J which had shown no connection between its minority ownership and the ultimate transportation service to be provided to the public should not receive any special consideration because of the mere fact of minority ownership standing alone.

Not only has O-J mischaracterized the decision of the Commission, but it also has charged the Court of Appeals with adopting this same view that minority ownership could never be considered by the Commission. In point of fact, the Court of Appeals opinion specifically recognized that the Commission can and does take account of minority factors in evaluating applications for authority when such factors are "found . . . to affect the transportation-related convenience and needs of the public". (*O-J Transport Co. v U.S.*, 536 F. 2d at 132) (A34) Indeed, the Court of Appeals quoted extensively from the Commission decision in *Elegante Tours, Inc. - Broker Application*, 113 M.C.C. 156, 160 (1971), in which the Commission extensively analyzed how minority status related to issues of public convenience and necessity. The Court of Appeals in no way stated that it is impermissible for a Federal agency to deal with the plight of minorities in this country, as alleged at page 22 of the O-J Petition. To the extent that the transportation needs of minorities in this country are not being met, the

¹For an example of a Commission decision overruling a line of authority, see *Adams Egg Farms, Inc., Contract Carrier Application*, 95 M.C.C. 282 (1964).

Commission is empowered to take action to meet those needs, including granting authorities to minority-owned carriers. Rather, the Court of Appeals decision merely affirms the Commission position that where there is no showing that the transportation needs of the public would be served by the entry of a minority-owned carrier into the business of hauling automobile parts between automotive plants, minority ownership could not be used as a determinative factor to support a grant of authority.

If there was ever any doubt as to the Commission's position as to the role of minority ownership in application proceedings, such doubt was conclusively eliminated by the recent Commission decision in *Shippers Truck Service, Inc. - 19 States*, 125 M.C.C. 323 (decided August 11, 1976). In the *Shippers* decision, the Commission clearly restated its prior policies considering the role of racial and ethnic factors in applications for operating authority.

We believe that our prior policy of considering racial and ethnic factors only when they relate to the nature of the transportation service proposed by an applicant, and the public's need for that service, is correct.

* * *

In this connection, we again reject the contention of protestants that racial or ethnic factors can never be relevant to deciding an application for operating authority. * * * Thus, a motor carrier offering a service specifically tailored to cater to the requirements of a specific class of users may be granted authority based on its superior ability to meet the transportation needs of the group in question. In this proceeding,

however, the applicant has made no such proposal. The recommended grant of authority was predicated solely on the race of applicant's president and owner, which fact relates in no way to the proposed transportation service. Accordingly, we cannot agree with the recommendation of the Administrative Law Judge. 125 M.C.C. at 330, 331.

Thus, if there was ever any uncertainty as to what the Commission meant in the *O-J* decision, that uncertainty has been conclusively eliminated by the Commission's decision in *Shippers*.

All of O-J's remaining arguments on minorities concern an alleged lack of minority representation in the ownership of motor carriers and the obligation of the Commission to redress imbalances in this area. However, in the absence of a showing that minority ownership would have a direct relationship to the transportation services involved in a particular application, the desirability of granting preference to minority applicants reflects a social judgment, rather than a judgment as to the public need for proposed additional transportation services under the Interstate Commerce Act. As was noted by the Court of Appeals below, even though minority-owned businesses may encounter problems in getting established, Congress has not chosen to require the Commission to consider minority ownership as a separate factor in determining public convenience and necessity. Even if the tenuous argument is made that an alleged lack of minority participation in the motor carrier industry has an adverse impact on that industry, such an

argument was never raised before the Commission in O-J. It is highly questionable whether the Commission could grant minority preferences under such an argument, and in view of the lack of any evidence or argument along these lines prior to the Petition for Certiorari, the Commission was obviously under no compulsion to accept such an argument.²

The Petition for Certiorari also seeks to have this Court consider the manner in which the Commission evaluated the standard transportation issues of public convenience and necessity in determining to deny the auto parts portion of the O-J application. The Commission's approach to these transportation issues is completely uncontroversial and in accord with many decisions of this Court and lower Federal courts. The Commission considered numerous factors in determining whether to grant the auto parts portion of the application, including the substantiality of the supporting shippers' need for an additional transportation service, the ability of existing carriers to provide service to these shippers, the participation of the protestant carriers in the traffic of these shippers and others within the scope of the application, and the potential impact of authorization of another carrier on the existing services of protestants. In particular, respondent carriers were shown to have a heavy interest in the loss of this vital automotive parts traffic from their lines, particularly on outbound movements from Detroit. Based on criteria stated in *Pan American Bus Line Operation*, 1 M.C.C. 190, 203 (1936) and repeated in countless decisions thereafter, the Commission weighed all of these factors and determined that no substantial public need for an additional service had been demonstrated. The Commission's basis for its denial is clearly stated in its report and, under standards

set forth in many Court decisions, cannot be said to be arbitrary and capricious. *Bowman Trans. v Arkansas-Best Freight*, 419 U.S. 281 (1974); *Feature Film Service Inc. v United States*, 349 F. Supp. 191 (SD, Ind., 1972); *Colorado-Arizona-California Express, Inc. v United States*, 224 F. Supp. 894 (D, Colorado, 1963); *Towne Service House Goods Transp. Co. v United States*, 329 F. Supp. 815 (WD, Texas, 1971). Similarly, under the well-established standards of judicial review, it cannot be said that the Commission's decision is unsupported by substantial evidence. *Mississippi Valley Barge L. Co. v United States*, 292 U.S. 283 (1934); *United States v Pierce Auto Freight Lines*, 327 U.S. 515, 536 (1946); *Malone Freight Lines, Inc. v United States*, 107 F. Supp. 946, 949 (ND, Ala., 1952), aff'd 344 U.S. 929 (1952); *Illinois Cent. R. Co. v Norfolk and Western R. Co.*, 385 U.S. 57, 69 (1966). Accordingly, there is no merit to O-J's contention that the Commission or the Court of Appeals have improperly considered the transportation issues in this case.

CONCLUSION

The decision of the Court of Appeals is clearly correct, and there is no basis for granting certiorari. Accordingly, the Petition for Certiorari should be denied.

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²A similar argument was also rejected in *NAACP*. See 48 L. Ed. 2d at 292, footnote 7.